No. 09-1559

Supreme Court, U.S.
FILED
JUL 22 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

FRED CURTIS,

Petitioner,

v.

DONALD WAYNE GOOD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARK S. WERBNER
Counsel of Record
SAYLES | WERBNER
4400 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270
(214) 939-8700 (Telephone)
(214) 939-8787 (Facsimile)
mwerbner@swtriallaw.com

Counsel for Respondent Donald Wayne Good

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a police officer is entitled to an affirmative defense of qualified immunity against a violation of rights secured by the Fourteenth Amendment when he framed a defendant by manipulating a photo for a photographic lineup in order to procure a false identification from the victim in retaliation against the defendant, and whether such a violation was clearly established and illegal at the time the officer acted.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INTRODUCTION	1
COUNTERSTATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	7
I. The Fifth Circuit Was Correct In Dismissing Petitioner's Appeal and Ruling That Respondent's Constitutional Rights Were Violated by Petitioner	8
II. There Is No Split Among The Circuits: A Police Officer Is Not Entitled to Qualified Immunity Under the Facts Present in This Matter	12
III. There Is No Split Among Circuits Regarding A Police Officer's Liability When The Police Officer Manufactures Evidence And Conceals Such Evidence From The Judge	16
IV. Qualified Immunity Is Well-Established Law and There Is No Reason For The Supreme Court To Visit the Issue When a Police Officer Has Intentionally Secured a False Identification That Produced a Wrongful Conviction	18
CONCLUSION	22

TABLE OF AUTHORITIES

Page

CASES

Alexander v. City of South Bend, 433 F.3d 550 (7th Cir. 2006) 9, 13

Brady v. Dill, 187 F.3d 104 (1st Cir. 1999) 20

Brady v. Maryland, 373 U.S. 88 (1963) 19

Brewer v. Shasta County, 27 F. App'x 908 (9th Cir. 2001) 12

Buckley v. Fitzsimmons, 509 U.S. 259 (1993) 13

Buckley v. Fitzsimmons, 20 F.3d 789 (7th Cir. 1994) 13

Burns v. Reed, 500 U.S. 478 (1991) 13

Castellano v. Fragozo, 352 F.3d 939 (5th Cir. 2003) 10

Devereaux v. Abbey, 263 F.3d 1070 (9th Cir. 2001) 12

Doe v. Louisiana, 974 F.2d 39 (5th Cir. 1992) 20

Egervary v. Young, 366 F.3d 238 (3d Cir. 2004) 17, 18

Ex parte Good, No. AP-75,042, 2004 WL 3259016 (Tex. Crim. App. Nov. 17, 2004) 3, 5

Geter v. Fortenberry, 849 F.2d 1550 (5th Cir. 1988) ("*Geter I*") 8

Geter v. Fortenberry, 882 F.2d 167 (5th Cir. 1989) ("*Geter II*") 8

Good v. Curtis, 601 F.3d 393 (5th Cir. 2010) 6, 8

TABLE OF AUTHORITIES – Continued

Page

Good v. State, 723 S.W.2d 734 (Tex. Crim. App. 1986) 5

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 19, 20

Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988) 20

Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) 19

Landrigon v. City of Warwick, 628 F.2d 736 (1st Cir. 1980) 13

Manson v. Brathwaite, 432 U.S. 98 (1977) 9

McCord v. Maggio, 927 F.2d 844 (5th Cir. 1991) 20

McGhee v. Pottawattamie County, Iowa, 547 F.3d 922 (8th Cir. 2008), cert. granted, 129 S. Ct. 2002 (2009), cert. dismissed, 130 S. Ct. 1047 (2010) 13, 14

McMillan v. Johnson, 101 F.3d 1363 (11th Cir. 1996) 16, 19

McMillian v. W.E. Johnson, 88 F.3d 1554 (11th Cir. 1996) 10

Michaels v. McGrath, 531 U.S. 1118 (2001) 13

Newsome v. McCabe, 256 F.3d 747 (7th Cir. 2001) 14, 15, 16, 19

Sanders v. English, 950 F.2d 1152 (5th Cir. 1992) 16, 19

Schneider v. Simonini, 163 N.J. 336, 749 A.2d 336 (2000) 20

TABLE OF AUTHORITIES – Continued

Page

Spurlock v. Satterfield, 167 F.3d 995 (6th Cir. 1999) 11

Thorsted v. Kelly, 858 F.2d 571 (9th Cir. 1988) 19

Wilson v. Lawrence County, Mo., 260 F.3d 946 (8th Cir. 2001) 10

Wray v. City of New York, 490 F.3d 189 (2d Cir. 2007) 16, 17

Young v. Biggers, 938 F.2d 565 (5th Cir. 1991) 20

Zahrey v. Coffey, 221 F.3d 342 (2d Cir. 2000) 13

STATUTES

42 U.S.C. §1983 ..... 1, 5

CONSTITUTIONAL PROVISIONS

First Amendment 5, 6

Fourth Amendment 1, 5, 6

Fifth Amendment 5, 6

Sixth Amendment 6

Eighth Amendment 5, 6

Ninth Amendment 5, 6

Fourteenth Amendment ..... *passim*

Article I, Section 19 of the Texas Constitution 5, 6

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Amicus Brief of the United States, *Pottawattamie County v. McGhee* (No. 08-1065), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-1065_PetitionerAmCuUSA.pdf.....13, 14

INTRODUCTION

This case concerns a matter in which a criminal defendant has been exonerated of a conviction based on DNA evidence as a result of a wrongful conviction because a police officer deliberately framed the defendant. Donald Wayne Good (hereinafter referred to as "Respondent") brought a suit under 42 U.S.C. §1983 against Fred Curtis (hereinafter referred to as "Petitioner"), alleging that Petitioner violated his rights under the Fourth Amendment and Fourteenth Amendment when he told Respondent that he was going to "fix it" so Respondent would be framed for a crime that he did not commit, and Petitioner did so by manipulating a photographic lineup, fabricating probable cause, lying under oath, and failing to disclose all exculpatory evidence to the prosecutor, the judge, and the jury as to his illegal conducts.

Petitioner took an interlocutory appeal from the district court's denial of his motion for summary judgment on the basis of qualified immunity. The only issue before the Fifth Circuit court was whether Petitioner was entitled to qualified immunity with regard to the alleged violations of Respondent's Fourth and Fourteenth Amendment rights. Petitioner's Writ of Certiorari, Appendix ["Pet. App."] 2a. The Fifth Circuit court, following a well-reasoned analysis and in accordance with the ruling from the district court, stated that because genuine issues of material fact exist regarding Petitioner's conduct, Petitioner must be denied qualified immunity. Pet. App. 1a-15a. In

complete agreement with the district court, the Fifth Circuit dismissed the appeal. *Id.*

Petitioner should not be entitled to qualified immunity because Respondent has met his burden by alleging and providing sufficient summary judgment evidence to show: 1) Petitioner stated that he planned to frame Respondent for failing to cooperate; 2) Petitioner artificially manipulated Respondent's photograph to conform to composite sketch and description of Doe's assailant by darkening the picture; and 3) Petitioner knowingly presented the altered photograph with the purpose of obtaining a false identification as retaliation for Respondent's non-cooperation regarding an unrelated crime. Pet. App. 10a. Simply put, Petitioner, in retaliation, framed Respondent for a crime that he did not commit. Any reasonable official would know that framing an individual for a crime they did not commit by securing false identification, fabricating probable cause, lying under oath, and failing to disclose exculpatory evidence to the prosecutors, the judge, or the jury presents a constitutional violation. Accordingly, Petitioner is not entitled to qualified immunity.

COUNTERSTATEMENT OF THE CASE

On June 18, 1983, Respondent was arrested and charged with aggravated rape, aggravated robbery, and burglary of a habitation. After three trials, Respondent was wrongfully convicted and sentenced to

life imprisonment. Respondent served thirteen years, seven months, and five days in prison and was finally exonerated by DNA evidence on December 22, 2004. Pet. App. 2a; *Ex parte Good*, No. AP-75,042, 2004 WL 3259016 (Tex. Crim. App. Nov. 17, 2004).

On June 9, 1983, a man entered the Irving, Texas home of Jane Doe where he bound her and her eight year old daughter and brutally raped Jane Doe.[1] After Jane Doe was able to free herself and her daughter, she contacted the Irving Police Department, and the crime scene was subsequently processed for evidence. As a part of the investigation, a rape kit was prepared and Jane Doe gave a description of her assailant to the police. Jane Doe described her assailant as a white male in his twenties, six feet tall, about 190 pounds, clean shaven, with a medium to large build, blondish-brown hair, and dark tan skin tone. Based on Jane Doe's description a composite sketch of the assailant was prepared and distributed throughout the Irving Police Department.

On June 15, 1983, Respondent was arrested in an unrelated incident stemming from a prior DWI charge. Petitioner suspected that Respondent was responsible for certain unsolved daytime burglaries in Irving, brought Respondent to his office and started to interview him regarding the daytime burglaries. During

---

[1] Due to privacy concerns, throughout the course of this litigation both parties have agreed to refer to the victim of the June 9, 1983 rape as "Jane Doe."

the interview, Petitioner became irate because Respondent was not cooperating with him. Petitioner, who was not assigned to the investigation of Jane Doe's rape, pulled out a copy of the composite sketch in the Doe case and informed Respondent that he looked like the assailant, and if Respondent thought that he did not look like the assailant, Petitioner would "fix it" in a manner that Respondent would match the assailant.

Respondent refused to answer any questions, and Petitioner told Respondent that he was going to charge him with Doe's rape. Next, Petitioner took Respondent outside of his office and proceeded to take several pictures of him with a Polaroid camera. Petitioner repeatedly altered the light setting on the camera with each picture in an effort to make Respondent's photograph better match the "dark tan" skin of the assailant. Petitioner intentionally did not use a prior picture of Respondent that was taken at the time of the booking, but instead altered a Polaroid photograph of Respondent in creating a photographic lineup. Petitioner was successful only in obtaining Jane Doe to identify Respondent as the assailant; Jane Doe's daughter did not identify Respondent as the assailant. Petitioner prepared a probable cause affidavit, and Respondent was arrested on June 18, 1983, and charged with aggravated rape, aggravated robbery, and burglary of a habitation.

Respondent's first criminal trial ended in a hung jury, and his second trial resulted in a guilty verdict. The guilty verdict was later overturned because

of prosecutorial misconduct unrelated to the photographic lineup. *Good v. State*, 723 S.W.2d 734 (Tex. Crim. App. 1986). The State of Texas tried Respondent for a third time, and Respondent was convicted of burglary of a habitation with intent to commit rape. Petitioner testified at all trials and was the key witness for the prosecutor. Petitioner never disclosed to the prosecutors, the judge, Respondent's attorney, or the jury that he had told Respondent that he would "fix it" if Respondent did not cooperate with him or that he had altered Respondent's photo.

In 2001, the Dallas County Criminal District Court Number 3 granted Respondent's motion for post-conviction DNA testing, and the DNA test ruled Respondent out as Doe's assailant. Based on this new evidence, the Texas Court of Criminal Appeals granted Respondent's habeas petition and vacated his sentence. *Ex parte Good*, No. AP-75,042, 2004 WL 3259016 (Tex. Crim. App. Nov. 17, 2004). On December 22, 2004, all charges against Respondent were dismissed.

On November 17, 2006, Respondent filed a complaint in the United States District Court for the Northern District of Texas against City of Irving, Irving Police Department, the Chief of the Police for the City of Irving, individually and in his official capacity, and Petitioner, individually and in his official capacity under 42 U.S.C. §1983 for alleged violation of the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the Texas Constitution.

In March 2007, the District Court dismissed all claims against the Irving Police Department, the Irving Chief of Police, in his official and individual capacity, and Petitioner, in his official capacity. On June 1, 2009, the District Court also dismissed all claims against the City of Irving and claims against Petitioner, in his individual capacity, based on alleged violations of Respondent's First, Fifth, Sixth, Eighth, and Ninth Amendment rights. However, the District Court did not entirely dismiss Respondent's case. The District Court denied Petitioner's motion for partial judgment on the pleadings and motion for summary judgment as to Respondent's claims based on alleged violations of the Fourth and Fourteenth Amendments as well as Article I, Section 19 of the Texas Constitution, ruling that genuine issues of material fact exist as to whether Petitioner was entitled to qualified immunity. Pet. App. 32a-33a, 41a.

Petitioner filed an interlocutory appeal with regard to Petitioner's qualified immunity defense in connection with Respondent's claim under the Fourth and Fourteenth Amendments. On February 18, 2010, the Fifth Circuit denied Petitioner's appeal. Petitioner filed a motion for rehearing, and on March 23, 2010, the Fifth Circuit Court denied Petitioner's motion for rehearing and issued an Opinion. *See Good v. Curtis*, 601 F.3d 393 (5th Cir. 2010); *see also* Pet. App. 1a-15a. On April 8, 2010, Petitioner filed his Motion To Stay Issuance of Mandate For 90 Days Pending Filing of Petition for *Writ of Certiorari*. The Fifth Circuit automatically granted Petitioner's Motion To Stay

Issuance of Mandate and gave him until June 23, 2010, to file his *Writ of Certiorari* to the United States Supreme Court. On June 21, 2010, Petitioner filed his Petition for *Writ of Certiorari* to this Honorable Court. *See generally* Petitioner's Writ of Certiorari ["Pet."].

REASONS FOR DENYING THE PETITION

Throughout this litigation, Petitioner has attempted to change the focus of the actual issue in this case: Respondent presented sufficient summary judgment evidence to show that Petitioner's acts were intentional and that he purposefully wanted to "fix it" so Respondent would get framed for a crime that he did not commit, and Petitioner acted upon these intentions.

Petitioner has repeatedly attempted to recharacterize the facts in this case, arguing that the issue is as limited as to whether the photographic lineup was unduly suggestive; Petitioner, however, fails to recognize that the evidence has established that Petitioner said he would frame Respondent, acted on his promise, signed a false document, and failed to disclose the truth to the prosecutor and the judge. Pet. App. 10a. When taking all facts in the light most favorable to Respondent, both the trial court and the Fifth Circuit have agreed that there is sufficient summary judgment evidence to show that Respondent's rights were violated, and thus, there is no

qualified immunity protection available to Petitioner at this time as a matter of law, and whether Petitioner is entitled to qualified immunity is a question for the fact finder. Pet. App. 7a-15a.

As the Court of Appeals for the Fifth Circuit has previously held, "a police officer cannot avail himself of a qualified immunity defense if he procures false identification by unlawful means . . . for such activity violates clearly established constitutional principles." *Geter v. Fortenberry*, 849 F.2d 1550 (5th Cir. 1988) ("*Geter I*"). Further, when an individual has presented evidence as to which witnesses were encouraged to give false identifications and what means were used to encourage the witnesses to wrongly identify the individual, courts are in agreement that such evidence is sufficient to create genuine issues of material fact to overcome qualified immunity. *See Geter v. Fortenberry*, 882 F.2d 167 (5th Cir. 1989) ("*Geter II*"); *Good v. Curtis*, 601 F.3d 393 (5th Cir. 2010).

I. The Fifth Circuit Was Correct In Dismissing Petitioner's Appeal and Ruling That Respondent's Constitutional Rights Were Violated by Petitioner

Respondent's Fourteenth Amendment rights were violated when Petitioner manipulated his picture and created an inaccurate photo lineup in an effort to procure a false identification; specifically, when: 1) Petitioner told Respondent that he was going to

"fix it" in a manner that Respondent would match the assailant; 2) took the overt act of manipulating a Polaroid photograph of Respondent to make it darker; 3) intentionally did not use a prior picture of Respondent that was taken at the time of the booking; 4) interjected himself into an investigation not assigned to him; 5) prepared a probable cause affidavit and signed under oath; 6) failed to disclose exculpatory evidence to the prosecutor, judge, or the jury; and 7) lied under oath at trial.

Petitioner relies on cases involving the application of test when there is allegations regarding suppression of evidence and, therefore, the resulting identification may be questionable. A misidentification or "suggestive lineup" suppression tests, to be applied where a police officer deliberately and intentionally procures a false identification by an unlawful means, is simply inapplicable to the facts involved in this matter. *See Manson v. Brathwaite*, 432 U.S. 98 (1977) ("The standard for evaluating the admissibility of identification evidence focuses on whether the identification procedure was unduly suggestive and whether the resulting identification is reliable."); *see also Alexander v. City of South Bend*, 433 F.3d 550 (7th Cir. 2006) (Applying *Braithwaite* test focusing on whether unduly suggestive identification techniques tainted the trial.). Very different than suppression of evidence, this is a case where the facts indicate that Petitioner deliberately "framed" a criminal defendant based on the manufacturing and manipulation of evidence. The Fifth Circuit correctly

stated that a police officer who knowingly secures a false identification by fabricating evidence is not entitled to qualified immunity. Pet. App. 14a. As further outlined by the Fifth Circuit, Respondent has clearly met his burden by alleging and providing sufficient summary judgment evidence to show: 1) Petitioner stated that he planned to frame Respondent for failing to cooperate; 2) Petitioner artificially manipulated Respondent's photograph to conform to composite sketch and description of Doe's assailant by darkening the picture; and 3) Petitioner knowingly presented the altered photograph with the purpose of obtaining a false identification as retaliation for Respondent's non-cooperation regarding an unrelated crime. Pet. App. 10a.

Moreover, section 1983 provides a remedy to Plaintiffs who have been denied their Fourteenth Amendment due process right to a fair trial. *See Castellano v. Fragozo*, 352 F.3d 939, 942 (5th Cir. 2003). In *Castellano*, the court held that "a state's manufacturing of evidence and knowing use of that evidence along with perjured testimony to obtain a wrongful conviction deprives a defendant of his long recognized right to a fair trial secured by the Due Process Clause." *Id.* Wrongfully convicted persons have successfully brought claims in several circuits based on law enforcement officials' manufacturing evidence to obtain a wrongful conviction, failure to disclose exculpatory evidence, conducting an investigation that recklessly or intentionally disregards the innocence of the accused or a third party's guilt, or fabricating evidence. *See id.* at 955; *see also McMillian v.*

W.E. Johnson, 88 F.3d 1554 (11th Cir. 1996); *Wilson v. Lawrence County, Mo.*, 260 F.3d 946, 956 (8th Cir. 2001); *Spurlock v. Satterfield*, 167 F.3d 995, 1005 (6th Cir. 1999).

In the case at bar, Respondent's constitutional rights have been violated by Petitioner. Respondent has presented evidence showing that Petitioner stated that he planned to frame Respondent for failing to cooperate with him, Petitioner artificially manipulated Respondent's photo to match to the composite sketch and description of the victim's assailant by darkening the picture, and Petitioner knowingly presented the altered photograph with the purpose of obtaining a false identification as retaliation for Respondent's refusal to cooperate regarding a wholly unrelated crime. Petitioner fabricated and manufactured evidence and knowingly used it along with his perjured testimony to obtain a wrongful conviction, thus depriving Respondent of his long recognized right to a fair trial secured by the Due Process Clause. U.S. CONST. amend. XIV. Based on the substantial evidence that Petitioner acted to intentionally violate Respondent's constitutional rights, the Fifth Circuit correctly ruled that "qualified immunity generally protects 'all but the plainly incompetent or those who knowingly violate the law.'" Pet. App. 11a (citing *Malley v. Briggs*, 475, U.S. 335, 351 (1986).

II. There Is No Split Among The Circuits: A Police Officer Is Not Entitled to Qualified Immunity Under the Facts Present in This Matter

It has been well established that a police officer is not entitled to qualified immunity when he knowingly secures a false identification by fabricating evidence or otherwise unlawfully influences a witness. *See Devereaux v. Abbey*, 263 F.3d 1070, 1075, (9th Cir. 2001) (en banc) ("[W]e are persuaded that there is a clearly established constitutional due process right not to be subjected to criminal charges on basis of false evidence that was deliberately fabricated by the government."); *Brewer v. Shasta County*, 27 F. App'x 908, 912-13 (9th Cir. 2001) (unpublished) (applying *Devereaux* where "the detectives used suggestive procedures with the intent of obtaining an identification of [the plaintiff], irrespective of whether he was in fact guilty"). Petitioner argues that his fabrication of evidence, *by itself*, does not implicate or violate Respondent's due process rights, and based on this position, there is a split amongst Circuits. Pet. 12-27 (emphasis added). As a result, Petitioner asserts that the Fifth Circuit Court's holding widened an already existing split among the circuits, and last year, the Supreme Court saw fit to address this issue, but was not able to because the case was settled prior to its decision. *Id.* Petitioner's argument is misplaced under the facts of this case, and simply incommensurable, as many of the cases cited by Petitioner do not address the issue of qualified immunity of a police

officer. *See generally Alexander v. City of South Bend*, 433 F.3d 550 (7th Cir. 2006); *Landrigon v. City of Warwick*, 628 F.2d 736 (1st Cir. 1980); *Zahrey v. Coffey*, 221 F.3d 342, 351-54 (2d Cir. 2000); *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993); *Michaels v. McGrath*, 531 U.S. 1118 (2001).

Petitioner argues that this case presents an identical question of law as the question presented to this honorable Court in *Pottawattamie County v. McGhee*, Docket No. 08-1065; however, the two cases present a very different legal proposition as the issues presented in *McGhee* are far from identical. *McGhee v. Pottawattamie County, Iowa*, 547 F.3d 922, 933 (8th Cir. 2008), cert. granted, 129 S. Ct. 2002 (2009), cert. dismissed, 130 S. Ct. 1047 (2010). In *McGhee*, as prosecutors, the petitioners were arguing absolute immunity and whether a government official is entitled to immunity when he violates the due process rights of an innocent person by obtaining manufactured evidence *before filing a formal charge*. *Pottawattamie County v. McGhee*, Docket No. 08-1065; *see also Burns v. Reed*, 500 U.S. 478, 489-490 (1991). Unlike *McGhee*, this case is not about prosecutors being entitled to absolute immunity and is therefore inapposite, as the Eighth Circuit addressed the facts and issues in *McGhee* and their application solely to prosecutors. *See* Amicus Brief of the United States, *Pottawattamie County v. McGhee* (No. 08-1065), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-1065_PetitionerAmCuUSA.pdf. Moreover,

McGhee was not convicted at trial and the prosecutors did not testify under oath as Petitioner did so here; instead *McGhee* pled guilty. *McGhee*, 547 F.3d 922, at 925 (8th Cir. 2008). In *McGhee*, the Court also pointed out that, generally, courts looks to common law tort analogies to keep Section 1983 actions within proper bounds, which explains why prosecutors may not be held liable for fabricating evidence they introduce at trial, even though police officers who fabricate evidence may be held liable under Section 1983. *See* Amicus Brief of the United States, *Pottawattamie County v. McGhee* (No. 08-1065), p.6, *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-1065_PetitionerAmCuUSA.pdf. The difference between prosecutors and officers is not only in the role they play in the investigatory phase but also their role thereafter.

Unlike Respondent's case, in *McGhee*, the fabricated evidence was never used against him. *McGhee*, 547 F.3d 922, at 925 (8th Cir. 2008). As discussed, in the present case, Petitioner told Respondent that he was going to frame him for a crime, fabricated evidence, lied under oath in order to obtain probable cause, testified against Respondent during his trials, and never disclosed the truth of his knowingly malicious act to the prosecutors, the judge, or the jury.

The Seventh Circuit determined in *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001), that regardless of whether the claim is for malicious prosecution, if the trial was unfair due to Constitutional violations by the police, a due process claim exists. *Newsome*

also gives us a way of cutting through the prosecutor to get to the police officer:

> If officers are not candid with prosecutors, then the prosecutors' decisions – although vital to the causal chain in a but-for sense – are not the important locus of action. Pressure must be brought to bear elsewhere. Prosecutors kept in the dark by the police (and not negligent in failing to hire other persons to investigate the police) won't improve their performance with or without legal liability for their conduct. Requiring culpable officers to pay damages to the victims of their actions, however, holds out promise of both deterring and remediating violations of the Constitution.

Newsome v. McCabe, 256 F.3d 747, at 752 (7th Cir. 2001). Under the facts of this case, Respondent provided specific and confirming factual details regarding the alleged unlawful acts of Petitioner, including *inter alia*: 1) Petitioner stated that he planned to frame Respondent for failing to cooperate; 2) Petitioner artificially manipulated Respondent's photograph to conform to composite sketch and description of Doe's assailant by darkening the picture; and 3) Petitioner knowingly presented the altered photograph with the purpose of obtaining a false identification as retaliation for Respondent's non-cooperation regarding an unrelated crime. Pet. App. 10a.

Moreover, a law enforcement officer such as Petitioner was constitutionally required to promptly

furnish exculpatory information in his possession to the prosecutor's office. As numerous circuits have recognized, when Petitioner knowingly and willingly ignored material, exculpatory evidence, and failed to promptly furnish such evidence to the prosecutors in Respondent's criminal case, Petitioner violated the Respondent's constitutional rights. *See Newsome v. McCabe*, 256 F.3d 747, 753 (7th Cir. 2001); *see also McMillan v. Johnson*, 101 F.3d 1363 (11th Cir. 1996); *see also Sanders v. English*, 950 F.2d 1152 (5th Cir. 1992). Such facts were viewed by both the district court and the Fifth Circuit as constituting sufficient evidence to show that Respondent's constitutional rights were violated and that Petitioner is not entitled to qualified immunity. Pet. App. 7a-15a.

III. There Is No Split Among Circuits Regarding A Police Officer's Liability When The Police Officer Manufactures Evidence And Conceals Such Evidence From The Judge

Petitioner argues that the photographic lineup was not unduly suggestive, but fails to recognize that significant evidence presented in this matter indicates otherwise. Evidence relied on by both the district court and the Fifth Circuit showed that Petitioner framed Respondent as retaliation for Respondent's failure to cooperate with him in an unrelated matter. *Id.* Petitioner relies on *Wray v. City of New York*, 490 F.3d 189 (2d Cir. 2007), in which the Second Circuit found the liability of a police officer is cut off when

superseding acts by the judge and prosecutor act to break the causal chain of causation between the officer's acts and a violation of an individual's constitutional rights. *See Wray*, 490 F.3d 189, at 193 (2d Cir. 2007). However, in *Wray*, the court was presented with facts that focused merely on suggestive identification procedures and not the intentional acts of a police officer in fabricating evidence and deliberately concealing such a fabrication to the court. *See generally, Wray*, 490 F.3d 189 (2d Cir. 2007). Unlike the facts reviewed by the Second Circuit in *Wray*, Petitioner fabricated evidence and lied under oath by both signing a probable cause affidavit and testifying three times during the Respondent's trial.

Further, Petitioner cites and relies on a case that that actually supports Respondent's position. In citing *Egervary v. Young*, 366 F.3d 238, 248 (3d Cir. 2004), Petitioner incorrectly argues that a police officer's liability is cut off when an independent judge rules on the evidence and such evidence is admitted into the record. Pet. 32-36. This argument is invalid; *Egervary* is clear that the causal chain is cut *only* when the police officer presents the judge with "all the facts." *Egervary*, 366 F.3d 238, 247 (3d Cir. 2004). The Court states:

> To sum up, we adhere to the well-settled principle that, in situations in which a judicial officer or other independent intermediary applies the correct governing law and procedures *but reaches an erroneous*

> *conclusion because he or she is misled in some manner as to the relevant facts*, the causal chain is not broken and liability may be imposed upon those involved in making the misrepresentations or omissions.

Id. at 250 (emphasis added) (citing *Hand v. Gary*, 838 F.2d 1420 (5th Cir. 1988) and *Hector v. Watt*, 235 F.3d 154, 160 (3d Cir. 2001)). Contrary to Petitioner's argument, when the facts of this matter are accurately applied to the relevant caselaw, there exists no split amongst the circuits. Courts are in agreement that the causal chain is not broken when an independent intermediary rules based upon being misled due to a police officer's concealment of relevant evidence. *See id.* There is sufficient summary judgment evidence that establishes Petitioner is not entitled to qualified immunity because he mislead the prosecutor, the judge, and the jury during the Respondent's trials in order for Respondent to be convicted of a crime that he did not commit. Thus, the Fifth Circuit court has correctly concluded that Petitioner was not entitled to a qualified immunity defense.

IV. Qualified Immunity Is Well-Established Law and There Is No Reason For The Supreme Court To Visit the Issue When a Police Officer Has Intentionally Secured a False Identification That Produced a Wrongful Conviction

There is no dispute amongst the circuit courts that all police officers are required and presumed to

know what the law is and to act within its bounds, and that it is not objectively reasonable for a police officer to violate a person's constitutional rights unless there are exceptional circumstances present. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *see also Thorsted v. Kelly*, 858 F.2d 571 (9th Cir. 1988). Exculpatory evidence is evidence, which tends to suggest the innocence of a person suspected of or charged with a crime. It includes evidence, which tends to prove that a defendant in a criminal proceeding did not commit the crime, evidence which suggests that the crime might have been committed by someone else, and evidence which might be used to impeach witnesses who would testify against the person accused. A defendant has a constitutional right in a criminal case to be furnished with material exculpatory evidence in the hands of the prosecution and the police. Exculpatory evidence is "material" when it would undermine confidence in a conclusion that the defendant was guilty of the crime. *Brady v. Maryland*, 373 U.S. 88 (1963); *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). A law enforcement officer is constitutionally required to promptly furnish material exculpatory evidence in his possession to the prosecutor's office. If it is found that an officer knowingly and willfully ignored material exculpatory evidence and failed to promptly furnish it to the prosecutor in the criminal case against the plaintiff, then it should also be found that the officer violated the plaintiff's constitutional rights. *Newsome v. McCabe*, 256 F.3d 747, 753 (7th Cir. 2001); *McMillian v. Johnson*, 101 F.3d 1363 (11th Cir. 1996); *Sanders v. English*, 950

F.2d 1152 (5th Cir. 1992) (rejected by *Schneider v. Simonini*, 163 N.J. 336, 749 A.2d 336 (2000)); *Brady v. Dill*, 187 F.3d 104, 114 (1st Cir. 1999); *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988).

Further, a defendant in a civil rights case is not entitled to any immunity if he or she gave false information to a prosecutor on which the prosecutor based his or her charge against the plaintiff. *Young v. Biggers*, 938 F.2d 565, 570 (5th Cir. 1991). Any reasonable state actor employed in a capacity, which embraces law enforcement, would surely realize that misrepresenting or concealing facts to judges or prosecutors is a violation of guaranteed rights of the accused under the United States Constitution. *See Doe v. Louisiana*, 974 F.2d 39 (5th Cir. 1992). Moreover, qualified immunity is defeated if the official took the action complained of with malicious intention to cause a deprivation of rights, or the official violated clearly established statutory or constitutional rights of which a reasonable person would have known. *McCord v. Maggio*, 927 F.2d 844, 847 (5th Cir. 1991). Where a government official could be expected to know that certain conduct would violate constitutional rights, in such an instance, he may not claim the defense of qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

The significant evidence before this Honorable Court establishes that Petitioner is not entitled to qualified immunity. As both the district court and the Fifth Circuit have recognized, the significant evidence present in this matter raises questions of material

fact regarding Petitioner's deliberate failure to provide exculpatory information to the prosecutors office, efforts to secure a false identification, as well as Petitioner's furnishing of false information to the prosecutor, the judge, and the jury in this matter. Pet. App. 10a-14a. As such, Petitioner must not be allowed to assume the benefit of qualified immunity.

CONCLUSION

Petitioner's Petition for Writ of Certiorari should be denied because Petitioner has both failed to put forth reliable authority that is analogous with the facts of the case at bar and failed to show the existence of a split between circuits on any applicable issue of law. Because Petitioner has not put forth an issue that has not already been decided, he has failed to meet the substantial question requirement and therefore should be denied his Petition for Writ of Certiorari.

Respectfully submitted,

MARK S. WERBNER
Counsel of Record
SAYLES | WERBNER
4400 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270
(214) 939-8700 (Telephone)
(214) 939-8787 (Facsimile)
mwerbner@swtriallaw.com

Counsel for Respondent
Donald Wayne Good

July 2010